circumstances, would be an application for an order of certiorari to quash her decision. I would for the reasons given be constrained to dismiss this action with costs.

Case in respect of the second defendant

It is not disputed that the second defendant is a mere chargee and that as between the second defendant and the plaintiffs, there is therefore no direct legal relationship.

The crux of the plaintiffs' action is essentially against the decision of the first defendant and the second defendant has got nothing to do with it and it has been unnecessarily dragged to the court by the plaintiffs. This is borne out by the relief prayed for by the plaintiffs, namely,

> (C) An injunction against the second defendant by itself, servants or agents or appointees from carrying out the purported auction sale, which is scheduled to be held on 20 October 1988 until order by court to do otherwise.

It is thus clear, to my mind, that there is no reasonable cause of action against the second defendant. What is the meaning of 'a cause of action' as I said earlier, has been judicially considered by Salleh Abas LP in *Lim Kit Siang's* case[1] and I need not repeat them here. It follows therefore that the statement of claim against the second defendant is frivolous and that the second defendant has been improperly or unnecessarily made a party to the action. The plaintiffs' action in the circumstances is an abuse of the process of the court and I have no hesitation in dismissing this action against the second defendant with costs.

In view of my judgment wherein the action is dismissed by me, no order for dissolution of the injunction is really necessary, the injunction being ipso facto discharged as of course. (See *Willis* v *Yates, Coop.t Brough*[7] at p 177 and *Green* v *Pulsford*[8]).

Mr Cheng submitted that if the contentions of counsels for the defendants are held to be right then the plaintiffs are without any remedy. I am unable to agree with such a submission as I am of the opinion that the proper remedy for the plaintiffs, in the circumstances, is to apply for an order of certiorari to quash the decision of the first defendant. If the plaintiffs elected to proceed by way of declarations instead of an order for certiorari then it is a misfortune brought about by their own action.

Application dismissed.

Solicitors: *Cheng & Cheng; Dr Yaacob & Ismail.*

Reported by *PS Ranjan*

Rosita bte Amit v Tan Boon Seng

HIGH COURT (KUCHING) - SUIT NO KG 148 OF 1988
HAIDAR J
5 MAY 1989

Civil Procedure - Parties - Joinder - Action for specific performance of agreement by defendant to sell property to plaintiff - Defendant had earlier executed an absolute assignment of right, title and interest in property in favour of a bank - Defendant not defending action - Bank applying to be added as a defendant

The plaintiff had commenced an action against the defendant claiming, inter alia, specific performance of her agreement with the defendant by which the defendant had agreed to sell a piece of land with a house thereon to her. The defendant had earlier purchased the property from a property developer at a time when there was no document of title to the property. The defendant obtained a loan from the Public Bank Bhd to assist him in the purchase of the property and for which purpose he entered into a loan agreement with the bank and executed a deed of assignment by which he, inter alia, assigned to the bank all his rights, title and interest in the property as security for the loan. The bank lodged a caveat in respect of the property. The defendant had entered into his agreement with the plaintiff without the consent of the bank. The defendant took no positive steps to defend the action and the application for summary judgment under O 81 r 1 of the Rules of the High Court 1980. The bank applied to be added as a defendant to the action. In the meantime, the bank had commenced an action against the defendant to recover the sum owing to it by the defendant in regard to the loan.

Held, allowing the bank's application:

(1) Order 15 r 6(2)(b) of the Rules of the High Court 1980 allows any person to be joined as a party if it is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. In the present action it could not be said that the bank had no rights, title and interest in the property by virtue of the deed of assignment. By para (ii) of O 15 r 6(2)(b) any person may be added as a party if in the opinion of the court it is just and convenient to determine any question that may exist or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter as between him and that party as well as between the parties to the cause or matter. If the relief sought by the plaintiff to get an order of specific performance in respect of the property were granted, the rights, title and interests of the bank would be gravely and adversely affected.

(2) As the assignment was an absolute one, not purporting to be by way of charge only, the defendant, it would appear (without going into the merits), had no right to purportedly execute a sale and purchase agreement over the property to the plaintiff. The plaintiff was not competent to sue the defendant when the assignment is still subsisting and the bank had a rightful claim to be made a party to the action if not for the substitution of its name for the defendant. It followed that the application of the bank satisfied the provisions of O 15 r 6(2)(b) of the Rules of the High Court.

Cases referred to

1 *Hj Abdul Rahman bin Lisi* v *Haji Hassan bin Haji Yunos* [1983] 1 MLJ 93 (refd)
2 *Pegang Mining Co Ltd* v *Choong Sam & Ors* [1969] 2 MLJ 52 (refd)

3 *Nouvau Mont Dor (M) Sdn Bhd* v *Faber Development Sdn Bhd* [1984] 2 MLJ 268 (follid)
4 *Comfort* v *Betts* [1891] 1 QBD 737 (refd)
5 *Hipparion (M) Sdn Bhd* v *Chung Khiaw Bank Ltd* [1989] 2 MLJ 149 (refd)
6 *Hughes* v *Pump House Hotel Co Ltd* [1902] 2 KB 485 (refd)
7 *Read* v *Brown* (1888) 22 QBD 128 (refd)
8 *Walter & Sullivan Ltd* v *J Murphy & Sons Ltd* [1955] 2 WLR 919 (refd)
9 *Hee Awa & Ors* v *Syed Muhammad Sazalay & Anor* [1988] 1 MLJ 300 (refd)

Legislation referred to
Rules of the High Court 1980 O 15 r 6, O 81

KC Wong for the plaintiff.
SY Chin (Miss) for the defendant.
KJ Foo (Miss) for the bank.

Cur Adv Vult

Haidar J: Public Bank Berhad ('the applicant') by way of summons-in-chambers filed on 7 March 1989 (encl 19) applies for an order that the writ of summons No KG 148/1988 may be amended by adding its name as a defendant. The grounds of the application are:

(i) the presence of the applicant before the court is necessary to ensure that all matters in dispute in the action may be effectually and completely determined and adjudicated upon, and/or;
(ii) the reliefs asked for by the plaintiff in this case affect the rights of the applicant in the same subject matter, and it is just and convenient that the court be called upon to determine such questions or issues that may arise therefrom or that may relate thereto or be connected therewith;
(iii) such other grounds as appear in the affidavit of Mr John Chua Kheng Chiew sworn in support thereof.

The application is made under O 15 r 6(2)(b) of the Rules of the High Court 1980 ('RHC') and is supported by the affidavit of John Chua Kheng Chiew, the manager of the applicant. Rule 6(2)(b) reads:

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application -
>
> (a) ...
> (b) order any of the following persons to be added as a party, namely -
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

This jurisdiction of the court to grant or refuse the order of making any person as a party (with the exception as a plaintiff unless with his consent) is entirely discretionary.

It is to be noted that the defendant, through his counsel, Miss SY Chan did not object to the application. From the record, it is also to be noted that the defendant has not filed any defence to the action filed by the plaintiff and also no affidavit in opposition is filed to the O 81 application of the plaintiff. Therefore in this application it is necessary for me to consider the facts relating to the subject matter at issue and at stake. The subject matter is a unit of single storey semi-detached house on sub-lot 8 of lot 488 section 65 Kuching Town land district, now known as lot 3363 section 65 Kuching Town land district ('the property'). The property is now up for grabs, if I may say so, where the plaintiff wishes the property to be transferred to her and the applicant objects to this and now seeks to intervene, purportedly on the ground that it has rights, title and interests in the property by virtue of the loan agreement, deed of assignment and the memorandum of charge in escrow.

The facts are as follows. On 30 December 1985 a sale and purchase agreement was entered into between Won Development Sdn Bhd ('the developer') and the defendant for the sale of the property by the developer to the defendant. On 8 April 1986 the defendant entered into a loan agreement with the applicant for a sum of $70,000 to enable the defendant to purchase the property. The defendant bound himself to the terms and conditions of the loan agreement (see exh 'JC1' to encl 19). The defendant further entered into a deed of assignment dated 8 April 1986 (exh 'JC2') with the applicant whereby the defendant, inter alia, assigned to the applicant the defendant's rights, title and interests in the property as security for the loan of $70,000. At the time of the execution of the loan agreement between the applicant and the defendant, the title deed to the property had not been issued yet and to protect its rights, titles and interests the applicant caveated the property vide Caveat Instrument No 5157/1986 (exh 'JC3').

On 31 December 1986 the defendant entered into a sale and purchase agreement (see exh 'RBA 1' to encl 9) with the plaintiff purporting to sell the property to her in spite of the deed of assignment in favour of the applicant. This agreement ('RBA 1') with the plaintiff was executed by the defendant without the knowledge or consent of the applicant and would clearly appear to be in breach of the loan agreement ('JC1') in particular cll 22 and 59 thereof.

For the sake of convenience, I reproduce below cll 22 and 59 of exh 'JC1':

> 22 The borrrower(s) shall not transfer sell charge or otherwise howsoever deal with the said property or any part thereof or any interest therein or make the same subject to any burden charge encumbrance liability or lien whatsoever or make any application for the alteration of the category of land use or for the imposition of any fresh category of land use in respect of the said property (or for rescission removal or amendment of any condition or restriction affecting the said property) without the written consent of the bank first had and obtained.
>
> 59 The parties hereto agree that during the continuance of this loan agreement no dealing whatsoever be registered against the said property unless the bank has given its consent in writing to such registration.

As a result of the agreement dated 31 December 1986 between the plaintiff and the defendant, the plaintiff lodged a caveat against the property vide Caveat Instrument No 6088/88. On 1 July 1988 the plaintiff instituted the writ of summons No KG 148/1988 against the defendant claiming, inter alia, for specific performance of her agreement with the defendant and for damages. No defence has been filed by the defendant.

On 16 August 1988 the plaintiff applied for a summary judgment under O 81 r 1 of the RHC (encl 9) and again the defendant did not seem to file any affidavit in opposition to the plaintiff's said application. Having thus not taken any positive steps to defend the action and the O 81 application of the plaintiff, the defendant under the circumstances perhaps readily did not object to the application of the applicant to intervene in this action. Be that as it may, in the present application to intervene, the court is only concerned with whether the applicant's case comes within the ambit of O 15 r 6(2)(b) of the RHC.

The applicant through the affidavit of its manager, John Chua Kheng Chiew asserted that a sum of $60,000 was released pursuant to the loan agreement (see para 7) and the balance sum of $10,000 yet to be disbursed is explained in paras 13 and 14 thereof. The defendant defaulted in making instalment payments to the applicant in the manner covenanted under the loan agreement and deed of assignment and is indebted to the applicant as at 31 October 1988 in the sum of $70,653.22 and interest on the amount owing has been agreed at and is accumulating at the rate of 11% pa on monthly rests. The applicant by a letter of demand dated 31 October 1988 through its solicitors demanded for payment of the debt owed in the sum of $70,653.22 but the defendant has failed and continue to fail to make payment. Consequently, the applicant filed proceedings in the Sessions Court Kuching vide Summons No Suit KG 357/1988/1 against the defendant to recover the sum owing and this case is still pending in the Sessions Court, Kuching.

So much for the facts. I will now have to apply them according to law to see whether or not the applicant may be allowed to intervene. To follow Yusof Abdul Rashid J in *Haji Abdul Rahman bin Lisi* v *Haji Hassan bin Haji Yunos,*[1] at p 96 the test to be applied should be as expounded by the Privy Council in the case of *Pegang Mining Co Ltd* v *Choong Sam & Ors.*[2]

> Will his ('the applicant') rights or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

In the present action the plaintiff is seeking specific performance of the purported sale and purchase agreement entered into between the plaintiff and defendant and from the record, the defendant has not taken any positive steps either to defend the action itself or to oppose the application of the plaintiff under O 31 r 1 of the RHC in which event that in all probability the plaintiff may get the judgment if not for the present application to intervene by the applicant. If that be the case the applicant will no longer have any rights title and interests in the property and in fact will be deprived of the benefit of the property. It is then, I think, necessary to examine whether the applicant has any rights title and interests in the property, the subject matter of the action, which may be affected by the order of the court as in this case if judgment is given to the plaintiff.

In considering the rights title and interests of the applicant, in my view, it is important first to consider whether the deed of assignment ('JC2') is an absolute one, not purporting to be by way of charge only. In this context, the issue of assignment was extensively dealt with by the Federal Court in the case of *Nouvau Mont Dor (M) Sdn Bhd* v *Faber Development Sdn Bhd.*[3] In *Nouvau's* case, the appellant had purchased from the developer a shop office unit in a multi-storey shopping and office complex to be erected on land in Johore Bahru for the sum of $184,320. Subsequently the appellant entered into an agreement with the Public Bank, which agreed to give the appellant a fixed loan of $92,160. The appellant entered into a loan agreement with the bank and also executed an assignment of all his rights, title and interests in the property pending the issue of the strata title to the bank. Subsequently the respondent purchased from the developer the whole shopping and office complex excluding the units already sold by the developer. The appellant commenced proceedings against the respondent for certain declaratory reliefs. After the filing of the originating summons the assignment was revoked following the repayment and settlement of the fixed loan. A preliminary objection was taken by the respondent that the action could not be maintained in the name of the appellant as assignor. The learned Judicial Commissioner upheld the objection and struck out the proceedings. The Federal Court affirmed the decision of the court but for a different reason. The factual situation would appear, I think, to

be the same as in the present action except that here it was the defendant who purportedly by the sale and purchase agreement sold the property to the plaintiff without the applicant's consent.

Now, the assignment of 8 April 1986 appears to be in the form of a legal document signed by all the parties concerned, viz assignor (defendant), assignee (the applicant) and the vendor (the developer). After reciting that (a) the defendant had entered into a sale and purchase agreement with the developer for the purchase of one unit of single storey semi-detached house on sub-lot 8 of 488 section 65 Kuching Town land district, (b) that the Public Bank (the applicant) would give a loan to the defendant to enable him to pay off the balance of the purchase price, (c) that when the 'title' of the property was issued and registered in the name of the defendant he would execute and register a first legal charge of the property in favour of the Public Bank and, (d) pending the issue of the 'title' the defendant would assign to the Public Bank all his rights, title and interests in the property and the defendant duly executed the assignment in the following terms:

> 1 The assignor as beneficial owner of the said property hereby assign absolutely to the bank all his right, title and interest under the sale and purchase agreement and in and to the said property and the full benefits granted thereby and of all stipulations therein contained together with all the remedies for enforcing the same to hold the same unto the bank/assignee subject only to the proviso for redemption hereinafter contained. (Clause 1 of JC2) (Emphasis is mine)

Clause 2 provides for the assignor's warrants and covenants with the applicant/assignee. Clause 2.5 especially is very relevant and reads:

> this assignment shall remain in force until such time as it shall be revoked by the due execution and registration thereof by the assignor of the said legal charge over the said property in favour of the bank/assignee.

In cl 4 the vendor ('the developer') gives consent to the assignment and the vendor ('the developer') duly acknowledged a copy of the said assignment and had same duly recorded (see p 7 of the assignment). In cl 6 it reads:

> This deed shall be binding on the heirs personal representatives successors in titles and assigns of the assignor and the respective successors in titles and assigns of the bank/assignee and the vendor.

Therefore looking at the whole document of 8 April 1986 (JC2) I am of the opinion that the document was an absolute assignment and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956. The assignment was in terms absolute in the sense that the assignor (the defendant) intended to pass and transfer to the assignee (applicant/bank) absolutely the beneficial interest as well as the rights title and interests in the sale and purchase agreement dated 30 December 1985 and the remedies of enforcing them. The instrument clearly purported and was intended in point of form, to be an absolute assignment because of the use of the word 'absolute' in cl 1 thereof (see Fry LJ in *Comfort* v *Betts*,[4] and the recent Supreme court case of *Hipparion (M) Sdn Bhd Chung Khiaw Bank Ltd*[5]). If the assignment was an absolute one (not purportedly to be by way of charge only) the fact that it had the effect of passing to the assignee the rights title and interest of the assignor in the sale and purchase agreement and the beneficial interest of the assignor in the property under the sale and purchase agreement by way of security only did not derogate from the absolute character of that assignment (see *Hughes* v *Pump House Hotel Co Ltd*[6] and *Comfort* v *Betts*[4]).

In the case of *Nouvau*,[3] the Federal Court at p 369 held that if the assignment was an absolute one, not purporting to be by way of charge only, within the meaning of s 4(3) of the Civil Law Act 1956, then the assignor was not entitled to sue in its own name but the action should be brought by the assignee in its own name or by the assignee in the name of the assignor (*Read* v *Brown*,[7] *Hughes* v *Pump House Hotel Co Ltd*[6] and *Walter & Sullivan Ltd* v *J Murphy & Sons Ltd*[8]). Likewise here, in my view, the plaintiff should have brought the action against the assignee, the applicant, though perhaps the plaintiff can claim of no knowledge of the said assignment at the time of the filing of this action against the defendant. If that be the case there is the more reason for the applicant to intervene and be made a party to this action. In fact, in my opinion, the applicant can rightfully claim to step into the shoes of the defendant in this action.

The applicant in addition thereto, filed a private caveat on 25 April 1986 to protect its interest and the plaintiff filed a private caveat later on 6 June 1988 (see exh 'RBA2') and the plaintiff at the time of entering the sale and purchase agreement with the defendant should have checked whether the property is free from incumbrances and this she failed to do until, according to para 13 of her affidavit (encl 9) in support of her O 81 application she caused to make a search of the property on 28 June 1988 through her advocate, KC Wong and Associates. I think there is a failure on her part or even that of her counsel to act vigilantly before executing the said sale and purchase agreement otherwise she would not have so executed the said agreement if the incumbrances came to her knowledge. Whatever it is the applicant by the filing of the caveat of the property on 26 April 1986 had made known to the world at large of its rights title and interests to the property and the plaintiff should have had notice of this. It is not disputed that the sale and purchase agreement between the plaintiff and the defendant was made without the written consent of the applicant in breach of the loan agreement and the deed of assignment between the defendant and the applicant.

The plaintiff's counsel submitted that in order for the applicant to succeed it must be privy to the contract be-

tween the plaintiff and the defendant. I am unable to accept such a contention as O 15 r 6(2)(b) allows *any person* to be joined as party if it is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. In the present action it cannot be said that the applicant has no rights, title and interest in the property by virtue of the deed of assignment. In para (ii) of O 15 r 6(2)(b) *any person* may be added as a party if in the opinion of the court it is just and convenient to determine any question that may exist or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter as between him and that party as well as between the parties to the cause or matter. Therefore if the relief sought by the plaintiff to get an order of specific performance in respect of the property were granted, in my opinion, the rights, title and interests of the applicant would be gravely and adversely affected.

In the case of *Hee Awa & Ors* v *Syed Muhammad Sazalay & Anor*[9] in respect of a running-down case, the Supreme Court at p 301 held that the learned judge exercised his discretion correctly when he allowed the application by the respondent who are already defendants in the action to intervene to add the motorcyclist as a co-defendant and the application falls squarely within O 15 r 6(2)(b) and the respondents have a choice either to proceed under O 15 r 6(2)(b) or O 16 (relating to third party proceeding).

As I am of the opinion that the assignment was an absolute one, not purporting to be by way of charge only, the defendant it would appear (without going into the merits) has no right to purportedly execute a sale and purchase agreement over the property to the plaintiff. Following the judgment of the Federal Court in *Nouvau's* case[3] I am of the opinion that the plaintiff is not competent to sue the defendant when the assignment is still subsisting and the applicant has a rightful claim to be made a party to this action if not for the substitution of its name for the defendant. It follows in my view, that this application satisfies the provision of O 15 r 6(2)(b) of the RHC.

In the premises, I would made the following orders:

(a) the application of the Public Bank (the applicant) to intervene is allowed;
(b) the proceeding in the sessions court vide Summons No Suit KG 357/1988/1 be stayed pending the outcome of this action;
(c) costs of this application be in the cause.

Application allowed.

Solicitors: *KC Wong & Associates; Ee & Lim; Foo, Kana & Co.*

Reported by *PS Ranjan*

Leng Hong Yuen v Escalation Enterprise Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) - CIVIL SUIT NO 23-3034-86
SITI NORMA YAAKOB J
21 APRIL 1989

Civil Procedure - Writ and statement of claim struck out - Whether undertaking given was made to the plaintiffs - Master and servant relationship between the defendants - Instructions given by one defendant to another

This is an appeal by the plaintiff against the senior assistant registrar's order allowing the sixth defendant's application to have the plaintiff's writ and amended statement of claim against them struck out with costs. The sixth defendant was the secretary of the first defendant and co-signatory of the bank account of the first defendant. The first defendant obtained a loan for $5.5m and authorized the sixth defendant to make certain payments from the loan to the plaintiff. An arrangement was made between the plaintiff and the first defendant and pursuant to it, the sixth defendant executed a written undertaking to pay the sums of $130,000 and $170,000 to the plaintiff.

When the bank loan was released, the first defendant together with the second, third, fourth and fifth defendants refused to honour their obligations as borrowers and guarantors and the plaintiff turned to the sixth defendant on the written undertaking. The sixth defendant disputed liability on the ground that the undertaking was given to their principals and not the plaintiff.

Held, dismissing the plaintiff's appeal:

(1) There is a master and servant relationship between the first and the sixth defendants as the latter acted only on the instructions of the first defendant and could only make payments from the bank account managed by them on those instructions.

(2) The debt due to the plaintiff was a personal debt of the first defendant as evidenced in the resolution and the sixth defendant was merely authorized to make the payment. They were never a party to the arrangement between the plaintiff and the first defendant. The undertaking was addressed to the first defendant and copied to the plaintiff. The payments to be made on the undertaking came from the first defendant's account. The sixth defendant is not, therefore, the debtors of the plaintiff but merely agents and no cause of action can be founded.

Legislation referred to
Rules of the High Court O 18 r 19(1)(a)

Dennis Xavier for the plaintiff.
Harcharan Singh for the sixth defendant.

Cur Adv Vult

Siti Norma Yaakob J: On 19 January 1988, the senior assistant registrar allowed the application of the sixth defendant to have the plaintiff's writ and amended statement of claim against them struck out with costs under O 18 r 19(1)(a) and under the inherent jurisdiction of the court on the ground that the amended statement of claim discloses no cause of action against them. The present proceedings before me is an appeal by the plaintiff against the senior assistant registrar's order.